ZIKO ABBO & ANOR

v.

KETUA POLIS DAERAH BAU, KUCHING, SARAWAK & ORS

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
SYED AHMAD HELMY JCA
MOHAMED APANDI ALI JCA
[CIVIL APPEAL NO: Q-01-21-04]
7 JANUARY 2011

CIVIL PROCEDURE: *Action - Striking out, appeal against - Plaintiff sued defendants through his father as next friend - Plaintiff suffered from mental incapacity and speech disability - Plaintiff came within meaning of "mental patient" under s. 2 Mental Health Ordinance 1961 (Sarawak) - Plaintiff a "patient" for purposes of O. 76 Rules of the High Court 1980 and entitled to sue by his next friend - Plaintiff or next friend not required to obtain an order of court to maintain action in High Court - Mental Health Ordinance 1961 (Sarawak), ss. 2, 11 - Rules of the High Court 1980, O. 76 rr. 1, 2(1), 3(4), (5), 6*

CONSTITUTIONAL LAW: *Fundamental liberties - Access to justice - Plaintiff sued defendants through his father as next friend - Plaintiff suffered from mental incapacity and speech disability - No legal impediment to next friend acting for plaintiff - Equal protection of the law to all persons - Plaintiff or next friend not required to obtain an order of court to maintain action in High Court - Federal Constitution, art. 8(1) - Mental Health Ordinance 1961 (Sarawak), ss. 11 - Rules of the High Court 1980, O. 76 rr. 3(4), (5), 6*

WORDS & PHRASES: *"mental patient" - Mental Health Ordinance 1961 (Sarawak), s. 2 - Whether plaintiff came within meaning of "mental patient"*

WORDS & PHRASES: *"patient" - Rules of the High Court 1980, O. 76 r. 1 - Whether plaintiff a patient for purposes of O. 76*

The plaintiff, through his father as the next friend, sued the defendants, claiming special and general damages for alleged unlawful conduct and/or negligent act committed by police officers towards the plaintiff. The plaintiff, 18 years of age at the material time, suffered from mental incapacity and also a speech disability.

The defendants filed an application under O. 15 r. 6(2) and O. 76 rr. 1 and 2 of the Rules of the High Court 1980 ('RHC'), and obtained an order that the plaintiff's father cease to be the plaintiff's next friend. The plaintiff's action was thus struck out, resulting in the present appeal in which the following issues required determination: (i) whether the plaintiff was under disability and hence a patient for the purposes of O. 76 of the RHC; and (ii) whether the plaintiff had to obtain an order of court under O. 76 rr. 3(4), (5) or 6 of the RHC and s. 11 read with para. 2(h) of the Schedule to the Mental Health Ordinance 1961 (Sarawak) ('the (Sarawak) Ordinance') to commence the action in the High Court.

Held (allowing the appeal, and setting aside the High Court's order)
Per Low Hop Bing JCA delivering the judgment of the court:

(1) The entire medical evidence, on the facts, established that the plaintiff, being mentally retarded, had been a mental patient at all material times. He had undergone treatment and/or observation of his mental condition in the Sarawak General Hospital (Kuching), which was an approved hospital listed in the Mental Health (Approved Hospital) Notification 1962 (G.N.S. 1/62) published in the Sarawak Government Gazette (dated 5 January 1962). The plaintiff clearly came within the meaning of the expression "mental patient" under s. 2 of the (Sarawak) Ordinance, and a "patient" for the purposes of O. 76 r. 1 of the RHC. He was perfectly entitled to sue by his next friend under O. 76 r. 2(1) of the RHC. (para 26)

(2) Order 76 rr. 3(4), (5) and 6 of the RHC, and s. 11(1) and (2) of the (Sarawak) Ordinance and the Schedule thereto, were inapplicable in the instant case. The plaintiff's cause of action had been set out and his father, being the next friend of the plaintiff, could exercise lawful parental rights and obligations to take care of the plaintiff's welfare, including the commencement of this action in the High Court. There was no legal impediment to the next friend acting for the plaintiff. Such a legal impediment, if any, would be contrary to the fundamental liberty of the mentally retarded boy as enshrined under art. 8(1) of the Federal Constitution. The doors to justice must be made available and accessible to all persons,

irrespective of their mental condition, in order to accord equal protection of the law to them. There was no requirement for the plaintiff or the next friend to obtain an order of court to maintain this action in the High Court. (paras 32-37)

[Order accordingly.]

Bahasa Malaysia *Translation Of Headnotes*

Plaintif, melalui ayahnya sebagai sahabat wakil, menyaman defendan-defendan, dan menuntut gantirugi khas dan am bagi kelakuan yang menyalahi undang-undang dan/atau tindakan cuai yang dilakukan oleh pegawai-pegawai polis terhadap plaintif. Plaintif, yang berumur 18 tahun pada masa yang material, tidak berupaya secara mental dan juga mempunyai kecacatan pertuturan. Defendan-defendan memfailkan permohonan di bawah A. 15 k. 6(2) dan A. 76 kk. 1 dan 2 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), dan memperolehi perintah supaya ayah plaintif dihentikan dari menjadi sahabat wakil plaintif. Tindakan plaintif oleh itu dibatalkan, mengakibatkan rayuan semasa dalam mana isu-isu berikut perlu ditentukan: (i) sama ada plaintif mempunyai kecacatan dan oleh itu seorang pesakit bagi tujuan A. 76 KMT; dan (ii) sama ada plaintif mesti memperolehi perintah mahkamah di bawah A. 76 kk. 3(4), (5) atau 6 KMT dan s. 11 dibaca bersama-sama dengan perenggan 2(h) Jadual kepada Ordinan Kesihatan Jiwa 1961 (Sarawak) ('Ordinan (Sarawak)') untuk memulakan tindakan dalam Mahkamah Tinggi.

Diputuskan (membenarkan rayuan, dan mengenepikan perintah Mahkamah Tinggi)
Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah:

(1) Keseluruhan keterangan perubatan, berdasarkan fakta, membuktikan bahawa plaintif, sebagai seorang yang terencat akal, merupakan seorang pesakit mental pada semua masa material. Beliau telah menjalani rawatan dan/atau pemerhatian keadaan mentalnya di Hospital Am Sarawak (Kuching), yang adalah hospital yang diluluskan dan yang disenaraikan di dalam Pemberitahuan (Hospital Yang Diluluskan) Kesihatan Mental 1962 (G.N.S. 1/62) yang diterbitkan di dalam Warta Kerajaan Sarawak (bertarikh 5 Januari 1962). Plaintif jelas termasuk dalam maksud ungkapan "pesakit mental" di bawah s. 2

Ordinan (Sarawak), dan seorang "pesakit" bagi tujuan A. 76 k. 1 KMT. Beliau sememangnya berhak menyaman melalui sahabat wakilnya di bawah A. 76 k. 2(1) KMT.

(2) Aturan 76 kk. 3(4), (5) dan 6 KMT, dan s. 11(1) dan (2) Ordinan (Sarawak) dan Jadual kepadanya, tidak terpakai dalam kes semasa. Kausa tindakan plaintif telahpun dinyatakan dan ayahnya, sebagai wakil sahabat plaintif, boleh melaksanakan hak dan kewajipan ibu bapa untuk menjaga kebajikan plaintif, termasuk memulakan tindakan ini di dalam Mahkamah Tinggi. Tiada apa-apa halangan undang-undang bagi wakil sahabat bertindak untuk plaintif. Halangan undang-undang sebegitu, jika ada, akan bertentangan dengan kebebasan asasi budak terencat akal itu seperti yang ditetapkan di bawah Perkara 8(1) Perlembagaan Persekutuan. Pintu keadilan mesti terbuka kepada setiap orang, tidak kira keadaan mental mereka, supaya dapat memberikan perlindungan undang-undang yang sama rata kepada mereka. Plaintif atau wakil sahabat tidak perlu memperolehi suatu perintah mahkamah bagi mengekalkan tindakan ini dalam Mahkamah Tinggi.

[Diperintah sedemikian.]

Legislation referred to:
Courts of Judicature Act 1964, ss. 16, 17
Federal Constitution, art. 8(1)
Mental Disorders Ordinance 1952, s. 2
Mental Health Ordinance 1961 (Sarawak), ss. 2, 11(1), (2)
Interpretation Acts 1948 and 1967, s. 17A
Rules of the High Court 1980, O. 1 r. 5A, O. 15 r. 6(2), O. 76 rr. 1, 2(1), 3(2), (4), (5), 6

For the appellant - William Ding; M/s William Ding & Co
For the respondent - Mohd Taufik Mohd Yusoff SFC

[Appeal from High Court, Kuching; Suit No: 22-49-2002-1]

Reported by Suresh Nathan

JUDGMENT

Low Hop Bing JCA:

Appeal

[1] The learned judge of the Kuching High Court had allowed the respondents' (the defendants') application and struck out with costs the plaintiff's action on the ground that the plaintiff's father,

Abbo anak Ambong, has no *locus standi* and was incompetent to bring the action in his capacity as the plaintiff's next friend. Hence, this appeal by the plaintiff.

[2] We now give our grounds for allowing the plaintiff's appeal.

Factual Background

[3] The affidavits filed herein revealed that the plaintiff, Ziko anak Abbo, through his father as the next friend, sued the first, second and third defendants, claiming special and general damages for alleged unlawful conduct and/or negligent act committed by police officers towards the plaintiff on 26 August 2000.

[4] The plaintiff is a Malaysian citizen of Bidayuh origin. He resides in Kampung Bumbok at Mile 8 Jalan Kuching-Bau, Kuching, Sarawak. He suffers from mental incapacity and speech disability.

[5] On 26 August 2000, the (then) 18-year-old plaintiff left his house to play. Unknown to his parents, he strayed from his Kampung. He was subsequently found wandering by some villagers in another Kampung known as Kampung Peninjau, Bau at about 7pm. The villagers took him to the house of an off-duty police officer, one Sgt Willie Mering, in Kampung Peninjau, to seek assistance from the police officer. At about 9.30pm, three police officers on duty from the Bau Police Station came to Sgt Willie Mering's house and brought the plaintiff to the Bau Police Station. At about 11.30pm, the three police officers, thinking that the plaintiff was an Indonesian national, brought him to yet another village, Kampung Serikin, Bau, and beyond. They stripped him naked, and left him alone at the international border between Sarawak and Kalimantan Barat in the Republic of Indonesia.

[6] Subsequently, the plaintiff was missing, being lost in the unfamiliar remote jungle for a total period of 34 days, before he was fortuitously found by a hunter and rescued by a police search team on 28 September 2000. The plaintiff was in a near-death condition.

[7] The plaintiff's father and next friend brought the civil action in the High Court, seeking damages against the defendants.

[8] On 2 January 2004, the defendants filed an application by way of summons in chambers under O. 15 r. 6(2) and O. 76 rr. 1 and 2 of the Rules of High Court 1980, and obtained an order that the plaintiff's father cease to be the plaintiff's next friend, and so the plaintiff's action was struck out. (For brevity and convenience, a reference hereinafter to an Order and a rule is a reference to that Order and rule in the Rules of the High Court 1980.)

"Mental Patient"

[9] Learned Senior Federal Counsel Mr Mohd Taufik bin Mohd Yusoff opined that at the time of filing the action in the High Court, the plaintiff was neither an infant nor a patient under O. 76. He canvassed that the governing law is the (Sarawak) Mental Health Ordinance 1961 ("the (Sarawak) Ordinance") and not the (Malaya) Mental Disorders Ordinance 1952 ("the (Malaya) Ordinance").

[10] Plaintiff's learned counsel Mr William Ding maintained that the plaintiff is a person under disability and so is a patient under O. 76, in which case, his father may institute the action in the High Court as the plaintiff's next friend.

[11] The learned High Court Judge sustained the defendants' contention.

[12] Under this head, the question which we have to address is whether the plaintiff is a person under disability and hence a patient for the purposes of O. 76.

[13] The answer to this question requires an examination of the ambit of O. 76 and the (Sarawak) Ordinance.

[14] Under O. 76 r. 2(1), a person under disability does not have the capacity to bring proceedings in court. However, to this general procedural rule, there is a built-in exception in O. 76 r. 2(1) whereby the plaintiff may do so by his next friend.

[15] The legislative purpose of O. 76 r. 2(1) is certainly not to create obstacles or to cause obstructions. It is intended to be facilitative in the sense that it seeks to give access to justice specifically for, *inter alia*, a patient. It belongs to a species of social legislation which must be construed liberally in favour of a patient.

Order 76 r. 2(1) must be interpreted to promote its legislative purpose. This purposive interpretation is consistent with s. 17A of the Interpretation Acts 1948 and 1967 which reads:

> **Regard to be had to the purpose of Act**
>
> 17A. In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[16] Although s. 17A talks of the interpretation of an Act, we are of the view that this includes the rules made under an Act eg, the Rules of the High Court 1980 made under ss. 16 and 17 of the Courts of Judicature Act 1964, so that s.17A applies *mutatis mutandis* to the interpretation of rules made under the Courts of Judicature Act 1964. Order 76 r. 2(1) should be given a purposive interpretation, as expressly sanctioned in s. 17A.

[17] Order 76 r. 1 provides for the definition of words used in this Order. A "person under disability" is specifically defined as "a person who is an infant or a patient." As the plaintiff was 18 years of age at the time of filing his action, he was no longer an infant.

[18] On the other hand, O. 76 r.1 defines a "patient" as "a mentally disordered person within the meaning of the Ordinance", and "Ordinance" means "the Mental Disorders Ordinance 1952".

[19] With particular reference to Sarawak, O. 1 r. 5A. provides that "Where references are made under these rules to any provisions in the ..., Ordinances ... in force in Malaya there shall be substituted therefor references to the corresponding ... Ordinances ... in force in Sarawak ..."

[20] In Sarawak, the corresponding Ordinance is the (Sarawak) Ordinance. Hence, for the purposes of this action, a reference in O. 76 r. 1 to the Ordinance is a reference to the (Sarawak) Ordinance.

[21] While the (Malaya) Ordinance provides for the definition of a "mentally disordered person" in s. 2 thereof, the (Sarawak) Ordinance does not contain such a definition. Instead, s. 2 of the (Sarawak) Ordinance provides for the definition of a "mental

patient" as, *inter alia*, "a person who is undergoing treatment for, or observation of, his mental condition under this Ordinance in an approved hospital."

[22] In our view, the expressions "mental patient" in s. 2 of the (Sarawak) Ordinance and "mentally disordered person" in s. 2 of the (Malaya) Ordinance share a common denominator, which springs from conditions such as mental defect, disorder, incapacity or unsoundness of mind. They belong to the same genesis. The legislative purpose has also been manifested in their long titles respectively. In the (Malaya) Ordinance, the long title explains that the Ordinance is, *inter alia*, to consolidate the law to regulate proceedings in cases of mental disorder and to provide for the reception and detention of persons of unsoundness of mind in mental hospitals. The long title in the (Sarawak) Ordinance seeks to provide for the control and detention of persons of unsoundness of mind and of their property. For the purposes of these two Ordinances, the expressions "mental patient" and "mentally disordered person" are synonymous and may be used interchangeably, so that the word "patient" in O. 76 r. 1 would include a "mentally disordered person" within the (Malaya) Ordinance as well as a "mental patient" in the (Sarawak) Ordinance.

[23] We must now consider the above definition of "mental patient" in s. 2 of the (Sarawak) Ordinance in the context of a person who is undergoing treatment for, or observation of, his mental condition under this Ordinance in an approved hospital.

[24] Under s. 2 of the (Sarawak) Ordinance, an "approved hospital" is "a place approved by the Minister by notification in the Gazette as being suitable for the admission or treatment of mental patients."

[25] For the purpose of proving that the plaintiff's mental defect, disorder, incapacity or unsoundness of mind, as the case may be, the plaintiff tendered numerous medical reports and Government Hospital Discharge Summary *viz*:

(1) Sarawak General Hospital (Kuching) Case Summary dated 29 September 2002 which states that the plaintiff is a "mentally retarded boy";

(2) Sarawak General Hospital (Kuching) Discharge Summary dated 3 October 2000 which states that the plaintiff is "mentally challenged patient since childhood";

(3) Sarawak General Hospital (Kuching) Discharge Summary dated 15 November 2000 which states that, the plaintiff has "learning disabilities since childhood";

(4) Sarawak General Hospital (Kuching) Discharge Summary dated 7 December 2000 which states that the plaintiff is "mentally disabled since childhood";

(5) Sarawak General Hospital (Kuching) medical report by Dr Ng Chin Hin dated 20 September 2002 which states that the plaintiff has been "mentally retarded since childhood";

(6) Psychiatric Specialist report prepared by Dr Jimmy See Eng King of Government Hospital, Kota Sentosa dated 11 March 2003 stating that the plaintiff "suffered from epilepsy since the age of 13 years old and has pre-existing mental retardation since childhood";

(7) Plaintiff's admission to the Sarawak General Hospital, (Kuching) on 29 September 2000, where he was given a psychiatric review in the Sarawak General Hospital (Kuching); and

(8) Sarawak General Hospital (Kuching) Discharge Summary, stating that the plaintiff was "referred to psychiatrist, started on Midazolam 7.5 mg".

[26] Pursuant to the Mental Health (Approved Hospital) Notification 1962 (G.N.S. 1/62) published in the Sarawak Government Gazette dated 5 January 1962, the Schedule thereto listed "General Hospital Kuching" as having been approved by the Governor for the purposes of the (Sarawak) Ordinance 1961 and suitable for the admission or treatment of mental patients. The entire medical evidence above has established that the plaintiff, being mentally retarded, has been a mental patient at all material times. He had undergone treatment and/or observation of his mental condition in the Sarawak General Hospital (Kuching) which is an approved hospital listed in the said Gazette Notification. The plaintiff clearly comes within the meaning of the

expression "mental patient" under s. 2 of the (Sarawak) Ordinance, and a "patient" for the purposes of O. 76 r. 1. We therefore answered the above question in the affirmative. The plaintiff is perfectly entitled to sue by his next friend under O. 76 r. 2(1).

Court Order To Sue

[27] Defendants raised the second and final issue relating to the absence of a court order to authorize the next friend to conduct legal proceedings in the name of the plaintiff. Defendants referred to O. 76 r. 3(4) and (5) or O. 76 r. 6 and s. 11 of and para 2(h) in the Schedule to the (Sarawak) Ordinance. The learned trial judge upheld this contention.

[28] Plaintiff took the position that no such order is required.

[29] Under this head, the question for our determination is:

> Does the plaintiff have to obtain an order of the Court under O. 76 r. 3(4), (5) or O. 76 r. 6 and s. 11 read with para 2(h) of the Schedule to the (Sarawak) Ordinance to commence the action in the High Court?

[30] The relevant portion of O. 76 r. 3(2) provides as follows:

> Except as provided by paragraph (4) or (5) or by rule 6, an order appointing a person next friend ... of a person under disability is not necessary.

[31] The above general rule expressly contained in O. 76 r. 3(2) in effect dispenses with the necessity for obtaining an order of the court to appoint a next friend for a person under disability for the purposes of pursuing an action.

[32] Exceptions are set out in O. 76 r. 3(4) and (5) or O. 76 r. 6. Our analysis below would show that these exceptions are inapplicable here.

[33] Under O. 76 r. 3(4), "Where a person has been or is next friend ... of a person under disability in any proceedings, no other person shall be entitled to act as such friend ..., of the person under disability in those proceedings unless the Court makes an Order appointing him such friend ... in substitution for the person previously acting in that capacity." In our view, O. 76 r. 3(4)

applies to a situation where there is already an existing next friend to act for a person under disability, in which case, no other next friend can duplicate the capacity of the existing next friend, unless a court order has been obtained by the new next friend in substitution of the existing next friend.

[34] Order 76 r. 3(5) provides that "Where, after any proceedings have been begun, a party to the proceedings becomes a patient, an application must be made to the court for the appointment of a person to be next friend …, for that party." Order 76 r. 3(5) requires an order of the court to appoint a next friend for a plaintiff who, after commencement of proceedings, becomes a patient and so it is necessary for the patient to continue the proceedings through a next friend.

[35] The focus of O. 76 r. 6 is on the appointment of a guardian *ad litem*; and has nothing to do with the appointment of a next friend under consideration in this appeal.

[36] Next, s. 11(1) of the (Sarawak) Ordinance requires the application of the provisions contained in the Schedule thereto in relation to the management of the property and affairs of all patients, and regulates the management of the property and affairs of all patients. Section 11(2) thereof provides that where a judge has reason to believe that a person may be incapable by reason of mental disorder of managing and administering his property and affairs and the judge is of opinion that it is necessary to make immediate provision for any of the matters referred to in para (1) of the Schedule, then, pending the determination of the question whether that person is incapable as aforesaid, may exercise in relation to the property and affairs of that person any of the powers conferred on him in relation to the property and affairs of the patient by the Schedule so far as it is requisite for that provision to be made.

[37] We are of the view that the above provisions contained in s. 11(1) and (2) of and the Schedule to the (Sarawak) Ordinance are inapplicable here. The question in the instant appeal is not about the management of the plaintiff's property. The plaintiff's cause of action has been set out above and requires no repetition here. The father, being the next friend of the plaintiff, may exercise lawful parental rights and obligations to take care of the plaintiff's

welfare including the commencement of this action in the High Court. We know of no legal impediment to the next friend acting for the plaintiff. We are also of the strong view that such legal impediment, if any, will be contrary to the fundamental liberty of the poor mentally retarded boy as enshrined and accorded under art. 8(1) of the Federal Constitution. Such fundamental liberty, especially on the facts of this case, must be given a prismatic approach. The doors to justice must be made available and accessible to all persons, irrespective of their mental condition, in order to accord equal protection of the law to them. There is no requirement for the plaintiff or the next friend to obtain an order of the court to maintain this action in the High Court. We therefore answer the above question in the negative.

Conclusion

[38] We held that the learned High Court Judge had erred in striking out the plaintiff's action. In the circumstances, we allowed this appeal, set aside the order of the High Court and make an order that the next friend and the plaintiff's action be reinstated to enable him to pursue the plaintiff's claim against the three defendants in the High Court pursuant to due process of law.

[39] After hearing submissions, we fixed costs of RM5,000 here and in the court below. Deposit to be refunded to the plaintiff.